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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

<p>JAMES LEON DOWDY,</p> <p style="padding-left: 100px;">Plaintiff,</p> <p style="padding-left: 100px;">v.</p> <p>MICHAEL J. ASTRUE,</p> <p>Commissioner of Social Security,</p> <p style="padding-left: 100px;">Defendant.</p> <hr style="width: 40%; margin-left: 0;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>NO. EDCV 11-1111-MAN</p> <p>MEMORANDUM OPINION</p> <p>AND ORDER</p>
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Plaintiff filed a Complaint on July 19, 2011, seeking review of the denial of his application for supplemental security income ("SSI"). On August 18, 2011, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on March 12, 2012, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings.

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## SUMMARY OF ADMINISTRATIVE PROCEEDINGS

On October 5, 2007, plaintiff filed an application for SSI. (Administrative Record ("A.R.") 12.) Plaintiff, who was born on April 23, 1962 (A.R. 22),<sup>1</sup> claims to have been disabled since January 1, 2002 (A.R. 12), due to both mental and physical problems, including depression, paranoia, suicidal thoughts, hallucinations, obsessive compulsive disorder, drug dependency, mood swings, left knee replacement, inability to handle stress, and asthma. (A.R. 222.)

After the Commissioner denied plaintiff's claim initially and upon reconsideration, plaintiff requested a hearing. (A.R. 12.) On January 22, 2009, plaintiff, who was represented by an attorney, appeared and testified at an initial hearing before Administrative Law Judge Michael D. Radensky (the "ALJ"). (A.R. 12, 29-59.) Vocational expert Troy Scott also testified. (A.R. 29-59.) However, plaintiff did not appear for the supplemental hearing held on February 18, 2010, because he was incarcerated. (A.R. 12, 60-82.) Appearing and testifying at that time were independent medical expert David Glassmire and vocational expert David Rinehart. (*Id.*) On April 2, 2012, the ALJ denied plaintiff's claim (A.R. 12-24), and the Appeals Council subsequently denied plaintiff's request for review of the ALJ's decision (A.R. 1-4). That decision is now at issue in this action.

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<sup>1</sup> On the alleged disability onset date, plaintiff was 45 years old, which is defined as a younger individual. (*Id.*; citing 20 C.F.R. § 416.963.)

## SUMMARY OF ADMINISTRATIVE DECISION

The ALJ found that plaintiff has not engaged in substantial gainful activity since October 5, 2007, his application date (A.R. 14), and has the following severe impairments: "degenerative disc disease in the neck and back; degenerative joint disease in the left knee; mood disorder, not otherwise specified; anxiety disorder, not otherwise specified; [and] polysubstance abuse." (A.R. 15.) The ALJ found that plaintiff's impairments, including his substance abuse disorders, meet sections 12.04(c)(2) and 12.09 of 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. § 416.920(d)). (*Id.*)

The ALJ found that, even if plaintiff stopped abusing substances, his remaining limitations would constitute a severe impairment or combination of impairments. (A.R. 15.) However, the ALJ further found that plaintiff nonetheless would not have an impairment or combination of impairments that meets or medically equals any of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. § 416.920(d)). (*Id.*)

After reviewing the record, and presuming that plaintiff had stopped his substance abuse, the ALJ determined plaintiff would have the residual functional capacity ("RFC") to perform light work as defined in 20 C.F.R. § 416.967(b). (A.R. 16.) Specifically, the ALJ found that plaintiff:

could lift and/or carry 10 pounds frequently and 20 pounds occasionally; [plaintiff] could stand and/or walk 2 hours in

1 an eight-hour workday, and sit for 6 hours in an eight-hour  
2 workday; he could occasionally balance, stoop, kneel, crouch,  
3 crawl, or climb ramps, stairs, ladders, ropes, or scaffolds;  
4 [he] could frequently, but not constantly, use his right hand;  
5 is limited to simple repetitive tasks; he is precluded from  
6 interacting with the public, but he is allowed only non-  
7 intense interaction with co-workers and supervisors;  
8 [plaintiff] is precluded from tasks requiring hypervigilance  
9 or fast paced work.

10  
11 (*Id.*)  
12

13 With those limitations, the ALJ concluded that plaintiff would be  
14 unable to perform his past relevant work.<sup>2</sup> (A.R. 22.) Given plaintiff's  
15 RFC, age, education,<sup>3</sup> work experience, and the testimony of the  
16 vocational expert, the ALJ found that plaintiff could perform a  
17 significant number of jobs in the national economy if he stopped his  
18 substance abuse. (*Id.*) Specifically, the ALJ noted that plaintiff  
19 could work as "an electronics worker, a sewing machine operator, and an  
20 addresser." (A.R. 23.) Accordingly, the ALJ concluded that, because  
21 plaintiff would not be disabled if he stopped his substance abuse,  
22 plaintiff's substance abuse disorder is a contributing factor material  
23 to the determination of disability under 20 C.F.R. § 416.935. (*Id.*)  
24

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25  
26 <sup>2</sup> In his decision, the ALJ noted that the plaintiff has past  
27 relevant work as a car wash attendant, DOT 915.667-010, which is a  
28 light, unskilled job. (A.R. 22.)

<sup>3</sup> The ALJ found that plaintiff has a high school education and  
is able to communicate in English. (*Id.*)

1 Thus, the ALJ found that plaintiff has not been disabled within the  
2 meaning of the Social Security Act at any time from the date the  
3 application was filed through the date of his decision. (A.R. 23.)  
4

#### 5 STANDARD OF REVIEW

6

7 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
8 decision to determine whether it is free from legal error and supported  
9 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
10 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
11 evidence as a reasonable mind might accept as adequate to support a  
12 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
13 a mere scintilla but not necessarily a preponderance." Connett v.  
14 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the  
15 record can constitute substantial evidence, only those 'reasonably drawn  
16 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,  
17 1066 (9th Cir. 2006)(citation omitted).  
18

19 Although this Court cannot substitute its discretion for that of  
20 the Commissioner, the Court nonetheless must review the record as a  
21 whole, "weighing both the evidence that supports and the evidence that  
22 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
23 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
24 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
25 responsible for determining credibility, resolving conflicts in medical  
26 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
27 1035, 1039 (9th Cir. 1995).  
28

1 The Court will uphold the Commissioner's decision when the evidence  
2 is susceptible to more than one rational interpretation. Burch v.  
3 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
4 review only the reasons stated by the ALJ in his decision "and may not  
5 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
6 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
7 the Commissioner's decision if it is based on harmless error, which  
8 exists only when it is "clear from the record that an ALJ's error was  
9 'inconsequential to the ultimate nondisability determination.'" Robbins  
10 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v.  
11 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
12 at 679.

#### 13 14 DISCUSSION

15  
16 Plaintiff claims that the ALJ: (1) improperly considered the  
17 relevant medical evidence; and (2) improperly discounted the credibility  
18 of plaintiff and his girlfriend. (Joint Stipulation ("Joint Stip.") at  
19 4-12, 21-28.) Each of these claims lacks merit.

#### 20 21 I. The ALJ Properly Considered The Medical Evidence In The 22 Record.

23  
24 It is the responsibility of the ALJ to analyze evidence and resolve  
25 conflicts in medical testimony. Magallanes v. Bowen, 881 F.2d 747, 750  
26 (9th Cir. 1989). In the hierarchy of physician opinions considered in  
27 assessing a social security claim, "[g]enerally, a treating physician's  
28 opinion carries more weight than an examining physician's, and an

1 examining physician's opinion carries more weight than a reviewing  
2 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.  
3 2001); 20 C.F.R. § 416.927(d).

4  
5 The opinions of treating physicians are entitled to the greatest  
6 weight, because the treating physician is hired to cure and has a better  
7 opportunity to observe the claimant. Magallanes, 881 F.2d at 751. When  
8 a treating physician's opinion is not contradicted by another physician,  
9 it may be rejected only for "clear and convincing" reasons. Lester v.  
10 Chater, 81 F.3d 821, 830 (9th Cir. 1995). When contradicted by another  
11 doctor, a treating physician's opinion may only be rejected if the ALJ  
12 provides "specific and legitimate" reasons supported by substantial  
13 evidence in the record. *Id.*

14  
15 "The opinion of a nonexamining physician cannot by itself  
16 constitute substantial evidence that justifies the rejection of the  
17 opinion of . . . a treating physician." Lester, 81 F.3d at 831; see  
18 Pitzer v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990)(finding that  
19 the nonexamining physician's opinion "with nothing more" did not  
20 constitute substantial evidence). However, "[w]here the opinion of the  
21 claimant's treating physician is contradicted, and the opinion of a  
22 nontreating source is based on independent clinical findings that differ  
23 from those of the treating physician, the opinion of the nontreating  
24 source may itself be substantial evidence." Andrews, 53 F.3d at 1041.  
25 Independent clinical findings include "(1) diagnoses that differ from  
26 those offered by another physician and that are supported by substantial  
27 evidence, or (2) findings based on objective medical tests that the  
28 treating physician has not herself considered." Orn, 495 F.3d at 632

(internal citations omitted).

Plaintiff alleges four sources of reversible error in the ALJ's treatment of the relevant medical evidence: (A) failure to properly consider the opinion of Nancy A. McCarthy, M.D., a treating physician; (B) failure to properly consider the opinion of Shellee Pollard, a social worker; (C) failure to acknowledge plaintiff's use of a cane for ambulation; and (D) failure to comment on plaintiff's Global Assessment of Functioning ("GAF") scores. (Joint Stip. at 4-12.)

**A. The ALJ Properly Considered The Medical Opinion Of Dr. McCarthy, Plaintiff's Treating Physician.**

Plaintiff claims the ALJ "failed to properly consider the opinions of treating sources, including a medical source statement from Dr. McCarthy, M.D., which appears in the Administrative Record at AR1142-1146." (Joint Stip. at 6.) At the end of the medical disorder questionnaire cited by plaintiff, Dr. McCarthy opined:

Patient is totally disabled and is expected to be for life. Patient requires a significant degree of assistance and direction to perform activities of daily living. The patient[']s capacity to interact appropriately with others, communicate effectively, concentrate, complete tasks, and adapt to stresses common to the work environment (including the pressures of time, supervision & decision making) are severely impaired. This patient would not be reliable in



1 reporting for work, carrying out simple, repetitive tasks.

2 This patient has poor frustration tolerance, and has a limited

3 ability to interact w[ith] the public, peers and supervisors.

4 Current medications are needed to stabilize in the community.

5  
6 (A.R. 1146.)

7  
8 The ALJ only explicitly rejected Dr. McCarthy's opinion insofar as  
9 it expressed the opinion that plaintiff was disabled and could not work.

10 (A.R. 19.) Specifically, the ALJ rejected Dr. McCarthy's conclusion  
11 that plaintiff's mental limitations "prevent him from sustaining full  
12 employment." (*Id.*) The ALJ correctly observed that "these statements  
13 express an opinion on an issue reserved to the Commissioner, and the  
14 undersigned disregards *this conclusion* regarding the claimant's  
15 disability." (*Id.*; emphasis added) As the ALJ noted, "a statement by  
16 a medical source that you are 'disabled' or 'unable to work'" is not a  
17 medical opinion, and receives no special significance in the ALJ's  
18 disability determination. (*Id.*; 20 C.F.R. § 416.927). Therefore, to  
19 the extent Dr. McCarthy opined that plaintiff could not work, the ALJ  
20 provided a specific and legitimate reason for disregarding this opinion.

21  
22 To the extent that Dr. McCarthy's mental disorder questionnaire  
23 merited consideration as a medical opinion, as distinguished from a non-  
24 medical conclusion about plaintiff's disability, the ALJ did not  
25 expressly reject it. The ALJ stated that he had read and considered all  
26 of Dr. McCarthy's opinion, as contained in the record. (A.R. 19,  
27 stating, "The undersigned has read and considered the total disability  
28 statements made by Nancy A. McCarthy, M.D., a staff psychiatrist at the

1 parole outpatient clinic (Exs. 8F, pp. 7-11 and 11F, p. 2)."). The ALJ  
2 then expressly acknowledged the frequency and duration with which Dr.  
3 McCarthy or her staff treated plaintiff. (*Id.*, stating, "claimant has  
4 sought treatment once or twice a month, from April 2, 2007 to April 28,  
5 2008.") Furthermore, the ALJ expressly noted Dr. McCarthy's opinion  
6 that, "if the [plaintiff] was 'medication compliant, his ability to  
7 remain stable in the community is more likely.'" (*Id.*; citations  
8 omitted.) Upon consideration of all the medical evidence, including Dr.  
9 McCarthy's opinion, the ALJ determined that, if plaintiff stopped  
10 abusing substances (and presumably was compliant with his medication),  
11 he would maintain the mental capacity for simple repetitive tasks and  
12 non-intense interaction with co-workers and supervisors, but would be  
13 precluded from interaction with the public and tasks requiring  
14 hypervigilance or fast paced work. (A.R. 16.)

15  
16 There is nothing in Dr. McCarthy's *medical* opinion that directly  
17 contradicts this assessment. (A.R. 16, 1142.) As to plaintiff's social  
18 functioning, Dr. McCarthy opined,

19  
20 [plaintiff] has little capacity to interact well with others  
21 for any longer perio[d]s of time. He easily becomes  
22 inappropriate with others as he misreads social cues and his  
23 paranoid ideations remain acute. He cannot communicate well  
24 with family, landlords, or fellow employees. He has  
25 probl[em]s with neighbors. These behaviors have become more  
26 acute with his less[en]ed abil[i]ty to interact well with  
27 others *unless he is medication compliant*.

1 (A.R. 1144; emphasis added.)  
2

3 As to plaintiff's concentration and task completion, Dr. McCarthy  
4 opined that "[plaintiff] cannot sustain focus on everyday household  
5 routines. He cannot follow simple instructions oral or written. He has  
6 problems concentrat[ing] as he is easily distracted." (*Id.*)  
7

8 In fact, these very symptoms and limitations were recognized and  
9 taken into account by Dr. Glassmire, the medical expert, whose opinion  
10 the ALJ credited in formulating plaintiff's mental RFC assessment. The  
11 ALJ found the testimony of medical expert Dr. Glassmire "highly  
12 credible." (A.R. 20.) Dr. Glassmire opined that, absent substance  
13 abuse, plaintiff would have "mild difficulty with activities of daily  
14 living; moderate difficulty with social functioning; moderate difficulty  
15 with concentration persistence and pace." (*Id.*) Based on these  
16 findings, Dr. Glassmire -- in the very language of the ALJ's RFC  
17 assessment -- opined that plaintiff was limited to "simple repetitive  
18 tasks, no interaction with the public; non-intense interaction with co-  
19 workers; . . .[no] tasks involving hypervigilance or fast paced work."  
20 (*Id.*)  
21

22 In short, the ALJ's decision is not inconsistent to any significant  
23 degree with the opinion of treating physician Dr. McCarthy. However, to  
24 the extent that Dr. McCarthy's medical opinion could be read to suggest  
25 that plaintiff could neither perform simple, repetitive tasks nor engage  
26 in non-intense interactions with co-workers, the ALJ provided specific  
27 and legitimate reasons, supported by substantial evidence in the record,  
28 for rejecting those implications. First, the ALJ noted that, while

1 plaintiff did not apply for SSI benefits until October 5, 2007, Dr.  
2 McCarthy based her medical opinion on examinations of plaintiff  
3 beginning on April 2, 2007. (A.R. 18, in which the ALJ noted that "a  
4 significant amount of the treatment records are from the period of time  
5 prior to [plaintiff's] eligibility for benefits")<sup>4</sup>; see Dotson v. Astrue,  
6 2011 U.S. Dist. LEXIS 52751 at \*18 (E.D. Cal. May 17, 2011)(noting that  
7 an opinion rendered almost a year before the filing of plaintiff's SSI  
8 application was "stale and not time-relevant to [p]laintiff's current  
9 claim of disability," especially as compared to another opinion rendered  
10 one month after the application was filed). Second, the ALJ noted Dr.  
11 McCarthy's comment that plaintiff will have an increased ability to  
12 remain stable if he takes his medication as directed. (See A.R. 19,  
13 1145.) The ALJ also noted the contemporaneous report by plaintiff's  
14 treating physician Dr. Gurmit Sekhon, at the Arrowhead Medical Center,  
15 who also opined that plaintiff "'responded to the medication in the  
16 past' and would be stabilized on medication." (A.R. 19, 1250.)  
17 "Impairments that can be controlled effectively with medication are not  
18 disabling for purposes of determining eligibility for SSI benefits."  
19 Warre v. Comm'r, 439 F.3d 1001, 1006 (9th. Cir. 2006). Lastly, the ALJ  
20 gave significant weight to the opinions of the medical expert,  
21 consultative examiner, and State agency review physicians, finding "all  
22

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23 <sup>4</sup> As the ALJ correctly notes, plaintiff did not apply for SSI  
24 until October 5, 2007. Thus, while the ALJ considered plaintiff's  
25 complete medical history, including records that pre-date plaintiff's  
26 SSI application, the relevant period for determining whether plaintiff  
27 is entitled to benefits is the period beginning on October 5, 2007. See  
28 43 U.S.C. § 1382(c)(7)(noting that an application of an individual for  
SSI benefits shall be effective on the later of "the first day of the  
month following the date such application is filed" or "the first date  
of the month following the date such individual becomes eligible for  
such benefits with respect to such application"); see also 20 C.F.R. §§  
416.330, 416.335.

1 of these physicians are generally consistent in [opining] that  
2 [plaintiff] is able to perform work as determined by the [RFC] herein."  
3 (A.R. 22.)  
4

5 On January 22, 2008, licensed clinical psychologist and  
6 consultative examiner, Clifford Taylor, Ph.D., found "no credible  
7 evidence or impairment in [plaintiff's] ability to understand, remember  
8 and carry out job instructions, maintain attention, concentration,  
9 persistence and pace, relate and interact with supervisors, coworkers  
10 and the public or adapt to day-to-day work activities . . . ." (A.R.  
11 1089-90.) On February 20, 2008, State agency psychiatrist Barbara A.  
12 Smith, M.D., opined that plaintiff had no difficulty in "maintaining  
13 social functioning" and "maintaining concentration, persistence, or  
14 pace." (A.R. 1105.) On October 16, 2009, Dr. Taylor conducted a  
15 second consultative examination, and in consideration of plaintiff's  
16 "history of homelessness, poor social interactions, strong criminal  
17 history, and drug abuse history," Dr. Taylor found "evidence of moderate  
18 impairment in [plaintiff's] ability to understand, remember, and carry  
19 out job instructions, maintain attention, concentration, persistence and  
20 pace, and marked impairment in [plaintiff's] ability to relate and  
21 interact with supervisors, coworkers, and the public." (A.R. 1331.)  
22

23 Notably, the ALJ gave plaintiff a more restrictive mental RFC than  
24 either the State agency physicians or the consultative examiner. (A.R.  
25 16, 20.) Therefore, if Dr. McCarthy's medical opinion is construed to  
26 suggest that plaintiff could neither complete simple, repetitive tasks  
27 nor engage in non-intense interactions with coworkers, her opinion is  
28 contradicted by the opinions of non-treating physicians, which are

1 supported by independent clinical findings. See Andrews, 53 F.3d at  
2 1041.

3  
4 The ALJ gave specific and legitimate reasons for rejecting Dr.  
5 McCarthy's opinion to the extent it conflicted with the ALJ's assessment  
6 of plaintiff's mental RFC. As a result, the ALJ did not err in his  
7 assessment of Dr. McCarthy's opinion.

8  
9 **B. The ALJ Properly Considered The Opinion Of**  
10 **Plaintiff's Social Worker, Shellee Pollard.**  
11

12 Plaintiff also complains that the ALJ failed to properly consider  
13 the opinion of plaintiff's social worker, Shellee Pollard, LCSW, at the  
14 parole outpatient clinic. (Joint Stip. at 10.) Specifically, plaintiff  
15 points to Ms. Pollard's "finances" notes from February 11, 2008, which  
16 read:

17  
18 Patient is recommended for SSI. Patient is totally disabled  
19 and is expected to be for life. Patient requires a  
20 significant degree of assistance and direction to perform  
21 activities of daily living. This patient's capacity to  
22 interact appropriately with others, communicate effectively,  
23 concentrate, complete tasks, and adapt to stresses common to  
24 the work environment (including the pressures of time,  
25 supervision and decision making), are severely impaired.  
26 *However, he is currently working in sales and believes he can*  
27 *work and will try it.*  
28

1 (*Id.*, relying on A.R. 1112; emphasis added.)  
2

3 The social worker's report does not establish that plaintiff was  
4 incapacitated. First, for the same reason that plaintiff's treating  
5 physician may not usurp the role of the ALJ in determining plaintiff's  
6 disability, neither may plaintiff's social worker. Thus, the social  
7 worker's conclusion that "[plaintiff] is totally disabled and is  
8 expected to be for life" is not controlling. 20 C.F.R. § 416.927(d).  
9 Second, as a social worker, Ms. Pollard is not considered an acceptable  
10 medical source. 20 C.F.R. § 416.913(a),(d). The regulations treat  
11 "public and private social welfare agency personnel" as "other sources,"  
12 20 C.F.R. § 416.913(d)(3), and the ALJ may expressly disregard lay  
13 testimony if he "gives reasons germane to each witness for doing so."  
14 Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001). While the ALJ did  
15 not address the quoted finances notes, he did address plaintiff's most  
16 "recent CDC parole reports, dated February 25, 2008," in which Ms.  
17 Pollard reiterated, verbatim, her February 11, 2008 appraisal of  
18 plaintiff's finances. (A.R. 19, 1108-09.) In particular, the ALJ noted  
19 Ms. Pollard's statement that "[plaintiff] reported he was taking his  
20 medication and [it] was working to keep his symptoms under control[]." *(Id.)*  
21 This was an appropriate reason for disregarding Ms. Pollard's  
22 testimony, because plaintiff's self-reporting as to the efficacy of his  
23 medication belies Ms. Pollard's assessment of the nature and severity of  
24 plaintiff's limitations.<sup>5</sup> (*Id.*)  
25

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26  
27 <sup>5</sup> Moreover, Ms. Pollard's opinion of plaintiff's work-related  
28 limitations was reasonably credited in plaintiff's RFC, which limited  
him to simple, repetitive, non-hypervigilant tasks and non-intense  
interaction with co-workers. (A.R. 16.)

1           Therefore, the ALJ did not err in disregarding a portion of Ms.  
2 Pollard's reports.

3  
4           **C.    The ALJ Committed No Reversible Error By**  
5           **Excluding Plaintiff's Use Of A Cane From His**  
6           **RFC Assessment.**

7  
8           Plaintiff contends that the ALJ erred in his RFC assessment and  
9 hypothetical questions to the vocational expert, because his  
10 hypothetical questions "fail[ed] to include the requirement that  
11 plaintiff needs to use a cane whenever standing or walking." (Joint  
12 Stip. at 4.) Plaintiff relies on the vocational expert's testimony, and  
13 argues that the ALJ erred in ignoring the reduction in jobs that  
14 resulted from plaintiff's use of a cane:

15  
16           Question: []If the individual were using a cane when standing  
17                   or walking, would that have any effect on the jobs  
18                   you identified?

19           Answer: Not the addresser, [which] would not be impacted.  
20                   Both the sewing machine operator and electronics  
21                   worker need to move finished products when they  
22                   accumulate to some type of central place. Depends  
23                   on how far that central place is. If it's  
24                   reasonably close I don't see a significant impact.  
25                   It's almost a job by job situation. I guess in my  
26                   opinion it might be wise to erode the figures I've  
27                   provided by 50% to rule out the far distance  
28                   repositories.



1 Question: You're saying that at some point in time they have  
2 to like push a bin with finished product somewhere  
3 or carry a basket, or these sort of things?

4 Answer: Exactly. (AR79)

5  
6 (Joint Stip. at 5.)  
7

8 The ALJ's failure to credit plaintiff's cane usage does not  
9 constitute reversible error. As the ALJ expressly noted at the hearing,  
10 "[plaintiff] asserted he has been using a cane for 10 to 15 years."  
11 (A.R. 17; emphasis added.) However, there is little support for this  
12 assertion in the record. The ALJ noted that plaintiff underwent a left  
13 total knee replacement in 2005 (A.R. 18), and a physician's note dated  
14 January 26, 2007, indicates that plaintiff then required use of a knee  
15 brace and a cane (A.R. 18, 1065). A face-to-face parole report dated  
16 March 27, 2007, likewise indicated plaintiff used a cane for ambulation.  
17 (A.R. 1147.) However, by September 12, 2007, plaintiff's parole report  
18 indicated that plaintiff's "gait and movement [are within normal  
19 limits]" (A.R. 1158), and no parole reports during the relevant period  
20 beginning October 5, 2007 -- plaintiff's SSI application date --  
21 indicate any cane usage (A.R. 1061-79). The ALJ read and considered  
22 plaintiff's adult function report, dated April 14, 2008, in which  
23 plaintiff indicated that he used a cane.<sup>6</sup> (A.R. 17, 304.) In the same  
24 report plaintiff stated he could perform certain daily living activities  
25 such as "cleaning, watching television, maintaining personal care,  
26

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27 <sup>6</sup> The ALJ failed to mention an earlier adult function report  
28 completed by plaintiff only five months earlier, on October 25, 2007, in  
which plaintiff reported neither problems with squatting, bending,  
standing, or walking, nor any need to use a cane. (A.R. 258-59.)

1 riding in a car, and attending church a couple times a month." (A.R. 17,  
2 298-302.) Thus, although exertional limitations were alleged by  
3 plaintiff, the ALJ reasoned that "[plaintiff]'s ability to participate  
4 in the activities of daily living, stated above, undermined the  
5 credibility of the [plaintiff]'s allegations of functional limitations."  
6 (A.R. 17.)

7  
8 Moreover, the ALJ read and considered the third party function  
9 reports submitted by plaintiff's girlfriend, Katarena Loven, on October  
10 26, 2007, and April 14, 2008, respectively. (A.R. 17-18.) Although  
11 plaintiff asserted that he used a cane throughout that time period, only  
12 the latter of Ms. Loven's two reports identifies any exertional  
13 limitations or need to use a cane. (A.R. 241-48, 286-93.)

14  
15 Thus, the only evidence of plaintiff's cane usage during the  
16 relevant period is in the inconsistent testimony of plaintiff and his  
17 girlfriend -- individuals who, for reasons discussed below, the ALJ  
18 found lacked credibility. Given the lack of credible evidence to  
19 support plaintiff's alleged need to use a cane, the ALJ did not err by  
20 excluding such purported cane usage from plaintiff's RFC, and his  
21 hypothetical questions to the vocational expert. See Osenbrock v.  
22 Apfel, 240 F.3d 1157, 1164-65 (9th Cir. 2001)(ALJ not bound to accept as  
23 true the restrictions set forth in hypothetical if they were not  
24 supported by substantial evidence).

25  
26 Further, even assuming *arguendo* that the ALJ erred, any omission of  
27 plaintiff's asserted need to use a cane from the RFC determination and  
28 the hypothetical to the vocational expert would have been harmless. See

1 Stout, 454 F.3d at 1056 (where ALJ's error lies in a failure to properly  
2 discuss evidence favorable to the claimant, a reviewing court cannot  
3 consider the error harmless unless it can confidently conclude that no  
4 reasonable ALJ, when fully crediting the evidence, could have reached a  
5 different disability determination). As noted by plaintiff, even after  
6 accounting for plaintiff's alleged cane usage, the vocational expert  
7 still opined that plaintiff could perform jobs existing in significant  
8 numbers in the local and national economies. (A.R. 79.)

9  
10 Specifically, the vocational expert testified that cane usage would  
11 have no effect on plaintiff's ability to work as an addresser and would  
12 only erode the numbers of jobs as machine operator and electronics  
13 worker by 50%. (A.R. 79.) Without consideration of the cane, the  
14 vocational expert opined there were 4,550 such jobs available locally  
15 and 89,000 such jobs available nationally. (A.R. 76-77.) With cane  
16 usage, those numbers drop to 3,175 and 56,000 respectively.<sup>7</sup> The Ninth  
17 Circuit has held that fewer jobs in the local economy constitute  
18 "significant numbers." See Barker v. Secretary, 882 F.2d 1474, 1478  
19 (9th Cir. 1998)(reviewing district court decisions within this circuit  
20 and holding 2,466 jobs constitute a significant number under the case  
21 law from other circuits and district courts within this circuit).  
22 Although plaintiff hints that this Court should consider the population  
23 of the local region, which plaintiff asserts exceeds 15,000,000 (Joint  
24

---

25 <sup>7</sup> Available locally and nationally, there were, respectively,  
26 1,400 and 32,000 electronics worker positions, 1,350 and 34,000 sewing  
27 machine operator positions, and 1,800 and 23,000 addresser positions.  
28 (A.R. 76-77.) Halving only the electronics worker numbers to 700 and  
16,000, and the sewing machine operator numbers to 675 and 17,000, the  
resulting jobs available to plaintiff would total 3,175 locally and  
56,000 nationally.

1 Stip. at 5), "the plain language of the regulations do not contemplate  
2 a ratio analysis." Martinez v. Heckler, 800 F.2d 771, 775 (9th Cir.  
3 1986)(declining to ignore the number of jobs that plaintiff is able to  
4 perform and to analyze the ratio of jobs to the general population of  
5 the Greater Metropolitan Los Angeles and Orange County areas). No  
6 reasonable ALJ could have reached a different disability determination  
7 given this precedent. Therefore, to the extent the ALJ failed to  
8 account for plaintiff's alleged cane usage appropriately, it was  
9 harmless.

10  
11 For these reasons, the ALJ's treatment of plaintiff's alleged need  
12 to use a cane does not constitute reversible error.

13  
14 **D. The ALJ Properly Considered Plaintiff's GAF**  
15 **Scores In Determining Plaintiff's RFC.**  
16

17 Lastly, plaintiff objects to the ALJ's failure to comment on three  
18 GAF scores -- a 41, 34, and 48 -- which, according to plaintiff,  
19 indicate he is non-functional. (Joint Stip. at 10.) Federal courts  
20 have recognized that "an ALJ's failure to mention a GAF score does not  
21 render his assessment of a claimant's RFC deficient." Chavez v. Astrue,  
22 699 F. Supp. 2d 1125, 1135 (C.D.Cal. 2009)(collecting cases). As the  
23 cases cited in Chavez make clear, an ALJ's assessment of the medical  
24 evidence is not deficient simply because he fails to mention GAF scores  
25 of record. *Id.*

26  
27 All three of the GAF scores on which plaintiff relies were assessed  
28 while plaintiff was incarcerated in 2003 and 2006 (A.R. 353, 357, 371)

-- to wit, before the relevant time period at issue in this case. Further, the ALJ considered plaintiff's GAF scores from the relevant period. (A.R. 19-21.) The ALJ noted that on April 16, 2009, and shortly thereafter on April 20, 2009, plaintiff was assessed with GAF scores of 20 and 55 respectively, but that plaintiff was then abusing alcohol, marijuana, cocaine, and PCP. (A.R. 19-20.) The ALJ also acknowledged that, on October 16, 2009, "the consultative examiner diagnosed plaintiff with polydrug abuse and dependence and gave the [plaintiff] a GAF score of 50." (A.R. 21.) The ALJ found that plaintiff's GAF scores had "little evidentiary value," because they are "subjectively assessed scores reveal[ing] only snapshots of impaired and improved behavior," and he preferred, instead, to "give[] more weight to the objective details and chronology of the record." (A.R. 19, n.1.) The ALJ explained his reasoning with respect to plaintiff's GAF scores adequately and properly considered plaintiff's GAF scores in conjunction with the medical evidence as a whole.

\* \* \* \* \*

In sum, plaintiff has not identified any legal error in the ALJ's treatment of the relevant medical evidence. Moreover, the ALJ's RFC assessment is supported by substantial medical evidence. Plaintiff's first issue, therefore, does not warrant reversal or remand.

## **II. The ALJ Properly Discounted The Credibility of Plaintiff And His Girlfriend.**

Once a disability claimant produces objective medical evidence of

1 an underlying impairment that is reasonably likely to be the source of  
2 claimant's subjective symptom(s), all subjective testimony as to the  
3 severity of the symptoms must be considered. Moisa v. Barnhart, 367  
4 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345  
5 (9th Cir. 1991); see also 20 C.F.R. § 416.929(a) (explaining how pain  
6 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of  
7 malingering based on affirmative evidence thereof, he or she may only  
8 find an applicant not credible by making specific findings as to  
9 credibility and stating clear and convincing reasons for  
10 each." Robbins, 466 F.3d at 883. The factors to be considered in  
11 weighing a claimant's credibility include: (1) the claimant's  
12 reputation for truthfulness; (2) inconsistencies either in the  
13 claimant's testimony or between the claimant's testimony and his  
14 conduct; (3) the claimant's daily activities; (4) the claimant's work  
15 record; and (5) testimony from physicians and third parties concerning  
16 the nature, severity, and effect of the symptoms of which the claimant  
17 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
18 2002); see also 20 C.F.R. § 416.929(c).

19  
20 The ALJ also is required to consider the credibility of lay  
21 testimony provided by family members and friends, who may provide their  
22 own statements regarding a claimant's disabling symptoms. Bruce v.  
23 Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009). If an ALJ rejects lay  
24 witness testimony, the ALJ must provide specific reasons that are  
25 germane to each witness whose testimony he rejects. *Id.* While lay  
26 testimony cannot be rejected merely because it is irrelevant to medical  
27 conclusions or not supported by medical evidence, *id.* at 1116,  
28 inconsistency with medical evidence is a germane reason to discredit lay

1 testimony. Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005).

2  
3 **A. The ALJ Properly Determined That Plaintiff**  
4 **Lacked Credibility.**

5  
6 The ALJ found that "if [plaintiff] stopped the substance abuse,  
7 [plaintiff's] medically determinable impairments could reasonably be  
8 expected to produce the alleged symptoms." (A.R. 18.) Further,  
9 although the ALJ cited affirmative evidence of malingering in the record  
10 (A.R. 21), he did not make a specific finding of malingering.  
11 Accordingly, the ALJ's reason for finding plaintiff to lack credibility  
12 must be clear and convincing.

13  
14 The ALJ stated that plaintiff's "statements concerning the  
15 intensity, persistence and limiting effects of [his] symptoms are not  
16 credible to the extent they are inconsistent with [the ALJ's RFC]  
17 assessment." (A.R. 18.) More specifically, the ALJ found plaintiff to  
18 be not credible because of: (1) inconsistencies between plaintiff's  
19 assertion regarding his functional limitations and his daily activities;  
20 (2) plaintiff's extensive criminal history involving crimes of deception  
21 and moral turpitude; and (3) inconsistencies between plaintiff's alleged  
22 functional limitations and the objective medical evidence. (A.R. 17-  
23 21.) These reasons are adequate to support the ALJ's unfavorable  
24 credibility determination.

25  
26 The ALJ's first ground for rejecting plaintiff's testimony -- that  
27 plaintiff's function report is internally contradictory -- is clear and  
28 convincing. The ALJ considered plaintiff's April 14, 2008, adult

1 function report but found plaintiff "only credible to the extent that he  
2 can do the work described herein." (A.R. 17.) He noted that  
3 "[plaintiff] stated he could do the following activities of daily living  
4 includ[ing]: cleaning, watching television, maintaining personal care,  
5 riding in a car, and attending church [a] couple times a month." (*Id.*,  
6 A.R. 298-302.) In particular, plaintiff explained that he takes "4  
7 hours to clean house because I do a thor[ough] job," and that he does so  
8 "everyday, sometimes 2x a day." (A.R. 300.) At the same time, the ALJ  
9 noted "[plaintiff] stated he has exertional, postural, and mental  
10 limitations that would make it difficult for him to work." (A.R. 17,  
11 303-04.) Specifically, plaintiff alleged that his condition affected  
12 his ability to lift, squat, bend, stand, reach, walk, talk, hear, see,  
13 remember, complete tasks, concentrate, understand, follow instructions,  
14 use his hands, and get along with others. (A.R. 303.) Plaintiff  
15 claimed he could only walk two blocks before needing to rest and could  
16 only pay attention for one minute at a time. (*Id.*) It is difficult to  
17 conceive how plaintiff could thoroughly clean house for four hours at a  
18 time, sometimes twice a day, if he had trouble lifting, bending,  
19 standing, completing tasks, using his hands, and concentrating for more  
20 than a minute. As the ALJ recognized, "[plaintiff]'s ability to  
21 participate in the activities of daily living, stated above, undermined  
22 the credibility of [plaintiff]'s allegations of functional limitations."  
23 (A.R. 17.) Therefore, the internal contradictions within plaintiff's  
24 adult function report provided a clear and convincing reason for finding  
25 that plaintiff lacked credibility.

26  
27 Second, plaintiff's extensive criminal history was also a clear and  
28 convincing reason supporting the ALJ's adverse credibility finding.



1 Felony convictions and convictions involving moral turpitude are a  
2 proper basis for an adverse credibility determination. Albiderez v.  
3 Astrue, 504 F. Supp. 2d 814, 822 (C.D. Cal. 2007)(finding plaintiff's  
4 convictions for false identification to a police officer and attempted  
5 robbery supported the ALJ's adverse credibility finding). As the ALJ  
6 explained, "[plaintiff] has admitted to being incarcerated with charges  
7 being one of moral turpitude or a crime of deception." (A.R. 18.) In  
8 particular, the ALJ noted that plaintiff "was charged with robbery which  
9 makes his credibility highly suspect." (*Id.*) Indeed, the exhibit that  
10 the ALJ referenced shows that, in addition to plaintiff's numerous drug-  
11 related convictions, plaintiff has been incarcerated for robbery, escape  
12 from jail, and vehicle crimes. (A.R. 346.) Thus, plaintiff's criminal  
13 history was a clear and convincing reason for finding that plaintiff  
14 lacked credibility.

15  
16 Finally, in view of the above findings, the inconsistency between  
17 plaintiff's subjective testimony and the objective medical findings  
18 provided an additional clear and convincing reason for finding that  
19 plaintiff lacked credibility. As the ALJ detailed, multiple reports by  
20 the consultative examiners contained evidence of malingering, which cast  
21 doubt on plaintiff's credibility. (A.R. 20-21.) In fact, on January  
22 28, 2008, at plaintiff's mental status consultative examination,  
23 plaintiff "failed the Test of Memory Malingering and his poor  
24 performance was consistent with malingering memory impairment." (A.R.  
25 21.) The ALJ noted the consultative examiner's report that "[plaintiff]  
26 embellished his symptoms and made inconsistent statements" and that  
27 "there was no credible evidence of a mental impairment as a result [of  
28 plaintiff's] poor cooperation in the examination." (*Id.*) During a

1 January 9, 2008, internal medicine evaluation, the consultative examiner  
2 noted that "[plaintiff] was not a good historian." (*Id.*) At an October  
3 16, 2009 mental status examination, on October 16, 2009, plaintiff's  
4 performance was again "consistent with malingering memory impairment."  
5 (*Id.*) Additionally, the ALJ relied on the consultative examiner's  
6 report, which found "inconsistencies between [plaintiff]'s presentation  
7 and history; [plaintiff] attained IQ test scores in the mental  
8 retardation range which were inconsistent with his verbal and  
9 work/school history." (*Id.*) Taken together, the reports from  
10 plaintiff's consultative examinations support the ALJ's conclusion that  
11 plaintiff's "statements concerning the intensity, persistence and  
12 limiting effects of [his] symptoms are not credible to the extent that  
13 they are inconsistent with [the ALJ's RFC] assessment." (A.R. 18.)  
14 Inconsistency with the objective medical evidence, thus, was a clear and  
15 convincing reason for finding plaintiff's testimony lacked credibility.

16  
17 Accordingly, the ALJ gave clear and convincing reasons for  
18 discrediting plaintiff's testimony.

19  
20 **B. The ALJ Properly Determined That Plaintiff's**  
21 **Girlfriend, Katarena Loven, Also Lacked**  
22 **Credibility.**  
23

24 The ALJ read and considered the third party function reports  
25 submitted by plaintiff's girlfriend, Katarena Loven, but "[found] her  
26 only credible to the extent that [plaintiff] can do the work described  
27 [in the ALJ's RFC assessment]." (A.R. 17-18.) The ALJ reasoned that,  
28 "[t]he third party function report has very little probative value in

1 that it mirrors [plaintiff]'s function report and allegations." (A.R.  
2 18.) The ALJ added that Ms. Loven is "not a medical professional," "she  
3 [had] the motivation to be helpful to [plaintiff] so he [could] receive  
4 benefits," and "her statements were not made under oath." (*Id.*) The  
5 ALJ concluded that "her assertions are not credible as they are not  
6 supported by any medically determined impairment." (*Id.*)

7  
8 Plaintiff complains that the ALJ's reasoning is circular and  
9 constitutes reversible error. (Joint Stip. at 22-24.) He contends  
10 that, "[i]f we are to accept the ALJ's analysis of Ms. Loven's third  
11 party statements, there would never be a third party statement  
12 acceptable by the Administration . . . ." (Joint Stip. at 22.) From  
13 this, plaintiff asserts that the ALJ's determination "makes no sense  
14 whatsoever other than it is the ALJ's attempt to support his  
15 predetermined decision to deny benefits in this case." (Joint Stip. at  
16 24.)

17  
18 Contrary to plaintiff's contention, however, the fact that Ms.  
19 Loven's reports "mirrored" plaintiff's function report was a germane  
20 reason for disregarding Ms. Loven's statements. Just like in  
21 plaintiff's function report completed the very same day as her report  
22 (A.R. 298-305), Ms. Loven reported that plaintiff is limited in lifting,  
23 bending, standing, reaching, walking, talking, hearing, seeing,  
24 completing tasks, concentrating, understanding, following instructions,  
25 and using his hands (A.R. 286-93). She likewise reported that plaintiff  
26 cleans house four hours a day, engages in certain daily activities  
27 including watching television, maintaining personal care, riding in a  
28 car, and attending church a couple of times a month. (*Id.*) Given that

1 Ms. Loven's third party report made the same assertion as in plaintiff's  
2 own report, which the ALJ properly found lacked credibility, the fact  
3 that Ms. Loven's statements mirrored those of plaintiff was a germane  
4 reason for disregarding her essentially identical report. See Valentine  
5 v. Astrue, 574 F.3d 685, 694 (9th Cir. 2009)(finding that because the  
6 ALJ gave clear and convincing reasons for rejecting the claimant's  
7 subjective testimony, the ALJ therefore gave germane reasons when he  
8 rejected the similar testimony of claimant's wife).

9  
10 \* \* \* \* \*

11  
12 For all these reasons, the ALJ did not commit reversible error with  
13 respect to his credibility findings.

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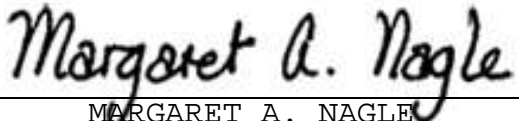
1 **CONCLUSION**

2  
3 For the foregoing reasons, the Court finds that the Commissioner's  
4 decision is supported by substantial evidence and is free from material  
5 legal error. Neither reversal of the Commissioner's decision nor remand  
6 is warranted.

7  
8 Accordingly, IT IS ORDERED that Judgment shall be entered affirming  
9 the decision of the Commissioner of the Social Security Administration  
10 and dismissing this action with prejudice. IT IS FURTHER ORDERED that  
11 the Clerk of the Court shall serve copies of this Memorandum Opinion and  
12 Order and the Judgment on counsel for plaintiff and for defendant.

13  
14 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

15  
16 DATED: January 31, 2013

17  
18   
19 MARGARET A. NAGLE  
20 UNITED STATES MAGISTRATE JUDGE  
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26  
27  
28